APPEAL NO. 93168

On January 19, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). The issue at the hearing was whether the respondent (claimant herein) sustained an injury in the course and scope of his employment with his employer, (employer), on (date of injury). The hearing officer decided the issue in favor of the claimant. The appellant (carrier herein) requests that the case be remanded to the hearing officer so that "newly uncovered evidence" may be fully evaluated by the hearing officer. The claimant responds that the hearing officer's decision is supported by the evidence, that there is no new significant evidence in the case, and, even if there were, that the time for presenting this evidence to the fact finder has passed.

DECISION

The decision of the hearing officer is affirmed.

The sole issue at the hearing was whether the claimant sustained an injury during the course and scope of his employment with the employer on (date of injury). The employer is in the coal mining business. On (date of injury), the claimant worked for the employer as a pumper. The claimant testified that on (date of injury) he was riding in the employer's pumper truck on a rough road at one of the employer's mining sites when the truck hit a bump throwing him into the ceiling of the truck which resulted in immediate pain in his neck and back. On May 8, 1992, after being terminated for excessive tardiness, the claimant went to a hospital emergency room where he was diagnosed as having lumbar strain and was prescribed pain medication, physical therapy, and bed rest. Subsequently, the claimant began treatment with a chiropractor who diagnosed cervical sprain/strain and lumbar facet syndrome, and took the claimant off work from May 20 until at least July 23, 1992. In June 1992, another doctor diagnosed the claimant as having a lumbar strain, but said the claimant could return to work without restrictions. The claimant reported to the chiropractor and to the doctor he saw in June that he sustained his injury at work while riding in the pumper truck. The claimant said he had no history of back problems. The hearing officer determined that the claimant sustained an injury in the course and scope of his employment with the employer on (date of injury).

The carrier's appeal centers on a conflict between the claimant's testimony at the hearing and a statement the claimant gave prior to the hearing. The claimant gave a recorded statement to the carrier in June 1992 in which he said that he thought that a coworker named Mr L was with him in the truck on the day of the incident, that Mr L saw him get injured, and that he told Mr L he was injured. The claimant did not know Mr Ls surname. The recorded statement was transcribed and introduced into evidence by the carrier without objection by the claimant. The transcribed statement is not signed nor sworn to by the claimant. The carrier also introduced into evidence without objection a

transcribed recorded statement of Mr L which was also taken in June 1992. The transcribed statement is not signed nor sworn to by Mr L. In the transcribed statement, Mr L said that he worked as a pumper on the same crew as the claimant and that he did not witness the claimant sustain an on-the-job injury and that the claimant did not mention an injury to him. At the hearing, the claimant first testified that he thought Mr L was with him in the truck, but then said he thought Mr W was with him in the truck. He acknowledged that it had to be either Mr L or Mr W because only two people ride in the truck. The claimant and the carrier did not introduce any testimony or statement from (Mr W). However, the claimant's supervisor testified that when he heard about the injury he called all of his crew in, including Mr L and Mr W, and no one on the crew, including Mr L and Mr W, knew anything about the claimant's alleged injury. In addition, the employer's employment manager testified that she understood that Mr L was riding in the truck with the claimant and that Mr L told her he had no recollection of the claimant being injured. The carrier did not ask the hearing officer for a continuance in order to allow it an opportunity to obtain Mr W's testimony or written statement.

The carrier requests that we remand the case to the hearing officer in order to allow it to present the testimony of Mr W to rebut the "new evidence" presented by the claimant at the hearing. The carrier states that to allow the claimant to materially change his story at the time of the hearing and introduce another key witness is unjust and denies the carrier the ability to fully present its case. The carrier also states that post-hearing investigation has indicated that (Mr W) has no knowledge of the claimant's injury.

We view the carrier's request on appeal as being somewhat analogous to a request for a new trial based on the absence of a witness at the trial. In Jackson v. Van Winkle, 660 S.W.2d 807 (Tex. 1983), the Supreme Court of Texas stated that "[i]t is incumbent upon a party who seeks a new trial on the ground of newly discovered evidence to satisfy the court first, that the evidence has come to his knowledge since the trial; second, that it was not owing to the want of due diligence that it did not come sooner; third, that it is not cumulative; fourth, that it is so material that it would probably produce a different result if a new trial were granted." It has been held that a new trial may be granted, under proper circumstances, where it appears that the testimony of an absent witness is of a material character and probably true, and that a different conclusion may be reached on another trial. Hughes v. Grogan-Lamm Lumber Co., 331 S.W.2d 799 (Tex. Civ. App. - Dallas 1960, writ ref'd n.r.e.). However, a new trial will not be granted for the absence of a witness unless due diligence was exercised to procure his attendance in the trial court. Hughes, *supra*. Ordinarily, a motion for new trial will be denied if the absence of the witness was not made a ground of an application for a continuance or postponement in order that the absent testimony might be obtained. Hughes, *supra*. For example, in Clark v. Brown, 234 S.W.2d 1013 (Tex. Civ. App. - San Antonio 1950, no writ), the court held that the complaining party on appeal could not assert the absence of a witness as a ground for new trial where the party discovered the

witness' absence during the trial and did not make it known to the court, or seek a postponement or a continuance. *See also* 54 TEX. JUR. 3d *New Trial* Sec. 14 (1987).

In the instant case, the conflict between the claimant's prior statement and his testimony at the hearing concerning who was riding in the truck with him was apparent at the time of the hearing, and the carrier, on becoming aware at the hearing of its asserted need for (Mr W)'s testimony to rebut the testimony of the claimant, should have requested a continuance in order to attempt to secure that testimony. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.10(c)(3) (Rule 142.10(c)(3)), provides that a party may orally request a continuance during a hearing, but that in addition to showing good cause, the party must show that a continuance will not prejudice the rights of the other parties. The granting of a continuance is a matter resting within the sound discretion of the hearing officer. *See* Ray v. Ray, 542 S.W.2d 209 (Tex. Civ. App. - Tyler 1976, no writ); and Texas Workers' Compensation Commission Appeal No. 92093, decided April 24, 1992. Under the particular facts of this case where the asserted need for the testimony of the witness was apparent at the hearing and the carrier did not request a continuance or postponement in order to attempt to secure that testimony, we hold that the carrier's request for a remand of the case to offer the testimony of the witness is without merit and is denied. Additionally, we observe that the claimant's supervisor testified that (Mr W), the coworker whose testimony the carrier wants to offer to show that he had no knowledge of the claimant's injury, told him that he knew nothing about the injury. Thus, (Mr W)'s testimony would appear to be somewhat cumulative of the evidence already before the hearing officer, and as such, we cannot conclude that his testimony would produce a different result if a remand were ordered.

The decision of the hearing officer is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Thomas A. Knapp
Appeals Judge